

National Advisory Committee
to the U.S. Representative to the
Commission for Environmental Cooperation

May 24, 2001

The Honorable Christine Todd Whitman
Administrator, U.S. Environmental Protection Agency
401 M Street S.W.
Washington, D.C. 20460

Dear Governor Whitman:

The National Advisory Committee (NAC) to the U.S. Representative to the North American Commission for Environmental Cooperation (CEC) held its sixteenth meeting on May 3 and 4, 2001, in Washington, D.C.

In its deliberations, the NAC took note of this unique and particularly important juncture in the evolution of the CEC and in the ongoing role that the NAC has played in advising the U.S. government on issues of environmental cooperation within the NAFTA context. In assessing this moment in trilateral relations with our Canadian and Mexican neighbors, the committee thought it appropriate to include our reflections as part of its formal advice to you and your colleagues.

It was noted with great optimism that two new administrations will be represented during the eighth regular session of the Council, on June 27-29 in Guadalajara, Mexico. In Mexico, President Fox's government brings high expectations for new openness and a collaborative approach to environmental cooperation within the context of expanding trade relations. The new Secretary of Environment and Natural Resources, Victor Lichtinger, has for the first time been made a member of the President's Economic and Social Cabinets. Secretary Lichtinger brings to bear not only considerable prestige but also first-hand knowledge and experience of the CEC by virtue of his tenure as the Commission's first Executive Director.

Also with great expectation, the Committee welcomed President Bush's strong focus on U.S.-Mexican and tri-lateral relations in the context of a more general reorientation of U.S. foreign policy priorities towards the Western Hemisphere. The NAC strongly believes that in order to support U.S. policy objectives in the Hemisphere, and most especially the successful negotiation of the Free Trade Area of the Americas (FTAA), the cooperative aspects of NAFTA relationships should be nurtured and strengthened. In many ways, public perception of relations with our hemispheric neighbors is shaped by our experiences with the NAFTA and with the challenges on the U.S.-Mexican border. Of the many issues facing U.S.-Mexico bilateral relations, the environment is crucial in terms of generating public support for further trade promotion and expansion.

The NAC acknowledges the great progress made during the past six years within the CEC to address environmental problems in the border regions and throughout the continent. After years of rapid population growth and industrialization without adequate environmental investment or enforcement, Mexico has established environmental laws supported by the implementing regulations, standards, and institutional infrastructure needed to make them effective. Mexico's environmental policies have been supported by its larger efforts to decentralize authority, improve the court system, increase transparency, and combat corruption. The CEC has played a very valuable role in coordinating the efforts of the three governments to address common environmental challenges and protect shared resources. Additionally, the CEC has facilitated the development of a North American environmental network of government officials, citizen organizations, and businesses that are working on a wide range of environmental issues.

However, the NAC also recognizes that the majority of government resources for environmental protection are generated at the state level, and that state and local efforts play a central role in environmental protection. Growing urban populations and increased industrial activity, due in part to trade and investment liberalization under NAFTA, have placed significant strains on local systems for municipal waste water treatment, solid waste collection, open spaces and conservation habitat, and water distribution. The CEC has worked to support local efforts through the North American Fund for Environmental Cooperation, but more can be done in the areas of capacity building and trilateral support.

We understand that the Administration is undertaking a full assessment of the Commission for Environmental Cooperation, and we urge that this review consider the role of the CEC in the broader context of the other NAFTA institutions, international organizations such as the OECD, and domestic environmental priorities, particularly in the border regions.

As is our practice, we have attached advice letters on specific topics concerning the CEC. We discussed and agreed on advice on the following matters: the CEC Pollutant Release and Transfer Register program (Advice No. 2001-1); the citizen submissions procedure (Advice No. 2001-2); biodiversity (Advice No. 2001-3); Article 10(6) (Advice No. 2001-4); and energy (Advice No. 2001-5).

In advance of the Council meeting in Guadalajara, we would like to restate our support for the format used in the 2000 Council meeting in Dallas, whereby the NAC was invited to observe the portions of the Council session open to the JPAC. We found that format to be very helpful in terms of understanding the issues facing the Council and formulating practical advice to the Administration during the meeting, and we hope and expect that it will be used in the Guadalajara meeting. Additionally, the 2000 Council session was the first to organize joint meetings of the NACs from each of the Parties. We support continuing such joint meetings at future Council meetings with the understanding that such meetings should not duplicate the role of the JPAC, and would encourage that English-Spanish interpretation be made available. Finally, if the schedule for the Council meeting permits, the NAC would welcome the opportunity to meet with you briefly during the session in Guadalajara.

We would like to thank the many government officials who spoke to us at our meeting about CEC matters within their purview. We particularly appreciate their thoughtful and candid responses to our questions. As we have noted in the past, this type of dialogue with the government agencies engaged in the wide range of CEC matters is particularly helpful to us, since our advice is directed to the U.S. government as a whole, rather than to any one agency.

Very truly yours,

John H. Knox
Chair, National Advisory Committee

cc: Alan Hecht, Deputy Assistant Administrator for International Activities
Denise Ferguson-Southard, Chair, U.S. Governmental Advisory Committee
Liette Vasseur, Chair, Joint Public Advisory Committee
Stewart Elgie, Chair, Canadian National Advisory Committee
Mateo Castillo Ceja, Chair, Mexican National Advisory Committee
U.S. NAC Members

National Advisory Committee

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NAC Advice No. 2001-1: Pollutant Release and Transfer Register (PRTR)

We understand that Mexico is facing a significant number of environmental challenges and is under serious budget constraints, but we continue to believe that the further development of its national PRTR program should be among its top priorities. In that context, the NAC believes the PRTR program in Mexico should be developed along the following lines:

1. It should be multi-media, include facility- and chemical-specific reporting, and be publicly available. The program should be based on appropriate thresholds to capture priority releases and transfers, and emphasize the benefits of pollution prevention derived from participation in the program.

2. The EPA should provide assistance to the Mexican Government in order to move the PRTR implementation process forward.

3. The EPA should provide assistance to the business community to help with the process of data gathering and reporting and to the NGO community to educate communities on the uses of the PRTR data.

4. The EPA and the CEC should establish a cooperative effort in developing the capacity to implement the PRTR, SMOC, and criteria pollutant programs.

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NAC Advice No. 2001-2: The Citizen Submissions Procedure

Our advice on the citizen submissions procedure concerns two topics: the draft “Lessons Learned” report prepared by the Joint Public Advisory Committee (JPAC) and the pending requests by the Secretariat that the Council approve three factual records.

1. Draft “Lessons Learned” Report.

In general, we support the JPAC’s draft report on lessons learned from the CEC experience with the Article 14-15 submissions procedure. We strongly agree with its conclusions that citizen submissions play a unique and indispensable role in fostering vigorous environmental enforcement and that an independent Secretariat is an essential component of the process. We urge the U.S. Government to act with the other parties to adopt all of its specific recommendations for reforming the procedure to make it more timely, open, accountable, and effective. (Although in the past we opposed efforts to revise the Guidelines until more experience had been gained with the procedure, we support the limited revisions, if any, necessary to implement these recommendations, since they are based on the experience and public input that had been previously lacking.)

However, we believe that the report should have addressed three areas in more detail.

First, the report’s discussion of the independence of the Secretariat (p. 14) should have mentioned that in addition to the duties the Secretariat is given under Articles 14 and 15, which provide it independence even from the Council in certain important respects, the Secretariat must always act independently of control by parties acting outside the Council. Under Article 11(4) of the NAAEC, the members of the Secretariat “shall not seek or receive instructions from any government or any other authority external to the Council,” and each party must “not seek to influence them in the discharge of their responsibilities.” As a result, each party should refrain from *ex parte* attempts to influence the Secretariat as it carries out its duties under Articles 14 and 15. The JPAC might have usefully recommended that if a party or a submitter does seek to influence the Secretariat through *ex parte* contacts, the Secretariat should treat the written or oral communication as a supplement to the submission or response. That would entail the Secretariat’s posting either the communication itself (if the communication is written) or a written record containing a detailed description of the communication (if it is oral) in the submissions registry and giving the other party an opportunity to respond.

Second, we believe that the draft report’s recommendation with respect to Guideline § 10.2 does not go far enough. Section 10.2 provides that if the Secretariat recommends to the Council that it approve preparation of a factual record, the Secretariat must wait 30 days to make public a notice of its recommendation, and must wait until after the Council has acted on its recommendation to make its reasoning public. Section 10.2 was added in the 1999 revisions to

the Guidelines, which we opposed. The JPAC draft report (p. 16) recommends that the 30-day “blackout” period either be abolished or reduced (to allow the responding party to become aware of the recommendation before press inquiries). We believe that the period should be abolished. But if it is left in place, it should be reduced to no more than two or three days. More important, the report is silent on the longer “blackout” period that prevents publication of the Secretariat’s reasoning until after the Council has acted. As we have said in the past, “There is no legitimate reason for delaying publication of recommendations. Doing so decreases the transparency of the process, increases its delay, and undermines public confidence in it.” (NAC Letter of June 1, 2000.) We strongly recommend that the longer “blackout” period be abolished entirely.

Third, we are disappointed that the JPAC report contains no specific recommendations with respect to follow-up of factual records. We repeat our advice from last year on the importance of following up factual records, and of doing so in a cooperative rather than a confrontational way: “We believe that factual records would be more useful, and far more palatable to the Parties, if the Parties discussed and institutionalized ways in which they would lead to increased cooperation, rather than the potential (even if remote) for greater confrontation. We note that the Parties already have established extensive institutional cooperation in enforcement matters under CEC auspices, on which such discussions could build. We strongly encourage the U.S. government to pursue such discussions with the other Parties.” (Advice No. 2000-2, May 2000.)

If all of the recommendations are adopted, the series of debates over the citizen submissions procedure may and should be put to rest. We have consistently said that for the procedure to work well, it must be allowed to work – that is, it must be free from continual attempts to revise the Guidelines. We believe that with these changes, the procedure should be free from efforts to revise it for the foreseeable future.

2. Pending Recommendations for Factual Records

The Council has three Secretariat recommendations for factual records before it: *Oldman River* (SEM 97-006), which the Council deferred in May 2000; *Aquanova* (SEM 98-006), which the Secretariat recommended in August 2000; and *Migratory Birds* (SEM 99-002), which the Secretariat recommended in December 2000.

The *Migratory Birds* submission is the first Secretariat recommendation for a factual record concerning the United States. By contrast, Canada and Mexico have been the subject of three recommendations each (and have been the subject of one completed factual record each). Apart from the decision to defer *Oldman River*, the Council has voted on four recommendations, two concerning Canada and two concerning Mexico. In each of these cases, the United States voted in favor of preparing the factual record, even when it was the only party to do so. These positions have been consistent with the U.S. position, expressed in Executive Order 12,915, that: “To the greatest extent practicable, pursuant to Articles 15(1) and 15(2), where the Secretariat . . . informs the Council that a factual record is warranted, the United States shall support the preparation of such factual record.”

We do not take a position on the merits of the *Migratory Birds* submission. But we strongly recommend that the U.S. government continue to hold to its long-standing position with respect to supporting preparation of factual records “to the greatest extent practicable” when the Secretariat has informed the Council that a factual record is warranted. We believe that it is very important that the United States apply the same standard to the first factual record concerning it that it has applied to previous requests for factual records concerning Canada and Mexico.

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NAC Advice No. 2001-3: Biodiversity

Our advice on biodiversity focuses on the draft council resolution to establish the Biodiversity Conservation Working Group.

The North American Agenda for Action: 2001-2003, the three year program plan for the NACEC, includes the establishment of a Biodiversity Conservation Working Group as an action for 2001. The purpose of the working group is to “provide guidance and direction on all biodiversity conservation issues related to North America for the NACEC Conservation of Biodiversity program.”(2.1.1 Strategic and Cooperative Action for the Conservation of Biodiversity in North America)

While the North American Agenda for Action includes creation of the working group and its general scope of work, it does not specify the membership of the Biodiversity Conservation Working Group.

Our understanding from EPA staff is that it is the Council’s intent to announce the creation of the working group at the Council Session in Guadalajara in June 2001. A recent draft of the proposed resolution indicates an agreement to establish “a Biodiversity Conservation Working Group comprised of *two senior government officials* selected by each Party...” (emphasis added).

Effective biodiversity conservation requires the cooperation of government, academia, landowners, and NGOs. This is especially true given the amount of environmental conservation efforts in North America occurring on non-federal lands. It is our understanding that the draft resolution is based on the model used to create the Sound Management of Chemicals (SMOC) working group. However, this model does not translate effectively since SMOC is, indeed, squarely a governmental responsibility while biodiversity conservation is carried out in many different arenas.

Therefore, we recommend that the Biodiversity Conservation Working Group should be developed as a multi-stakeholder working group, including but not limited to non-profit conservation groups, academia, private landowners, and state/local/provincial/municipal governments.

While a federal-only working group could consult non-governmental specialists, this does not allow for the in-depth interchange and advice that only can be received through full participation of a multi-stakeholder working group.

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NAC Advice No. 2001-4: Trade-Environment Issues and Article 10(6)

The NAC continues its strong support of cooperation between the CEC and the FTC under NAAEC Article 10(6). We believe that the Article 10(6) process can be further enhanced, and to that end offer advice on a number of specific topics below.

First, with respect to public participation, we were pleased to learn that the Alt. Reps have agreed to use the Montreal model for future 10(6) meetings, and that two JPAC members were present at the working group's October 13th meeting. We believe that the opportunity for significant public participation can both enhance the 10(6) process and facilitate greater public understanding of the working group's activities. To further these ends, we strongly urge the U.S. government to work with the other parties to accept JPAC's invitation to have a public meeting of the 10(6) working group in December.

Second, we are concerned that the 10(6) working group has paid insufficient attention to trade-and-investment issues. Even though no Chapter 11 decision to date has affected the ability of the United States to regulate on environmental issues, several pending Chapter 11 investor-state disputes may significantly contribute to public concerns about NAFTA's effect on the environment, just as trade-and-environment issues have sparked significant public concern over trade liberalization measures.

In part, the public concern in this area grows out of the lack of transparency of Chapter 11 proceedings. To address this concern, we strongly reiterate our earlier advice, from Advice No. 99-5, that the NAFTA parties should move expeditiously to develop ways to keep the public informed about Chapter 11 disputes that involve environmental concerns, such as releasing copies of the filings and decisions in Chapter 11 disputes to the public. We continue to support tribunals' ability to accept amicus briefs, and believe that those briefs too should be made publicly available.

Moreover, to the extent that Chapter 11 cases involve technical environmental issues, we believe that the 10(6) working group can provide a forum for bringing environmental expertise to bear on these issues. In particular, we strongly advise that EPA recommend that the working group expressly address the question of how Chapter 11 arbitral tribunals should and should not seek expert scientific advice and make use of environmental expertise. We note that this is a generic issue not confined to Chapter 11, and we would suggest that such an effort include all dispute settlement under NAFTA.

As pending Chapter 11 cases with environmental implications or other implications for the ability of governments to regulate appropriately are decided, we strongly urge EPA to carefully review the decisions, bearing in mind the desirability of requesting the 10(6) working group to thoroughly address any such implications.

Finally, as it addresses investment issues, the CEC should not limit its attention to Chapter 11 disputes. The NAFTA Effects framework has made an important contribution to understanding the positive and negative effects of trade on the environment. Drawing on the experience of the NAFTA Effects project, the United States should propose that the CEC organize analytic work on the environmental effects of liberalized investment in North America. Given the high political salience of -- and underdeveloped state of knowledge on -- this issue, we believe that the CEC is well positioned to make a significant contribution to understanding and policy implementation in this area.

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NAC Advice No. 2001-5: Energy and the Environment

The NAC is encouraged by the CEC's interest in electricity competition and the need for a North American energy policy. As we encourage free trade, we need to encourage environmental cooperation on an area with critical economic, environmental and human health ramifications. We look forward to the Advisory Board's report on electric restructuring and the environment.

While we will reserve the majority of our comments until we can review a draft of the report, and until we know more about implementation of the Bush Administration's energy policy, we want to emphasize that we firmly believe in the principle that we can and must encourage economic and energy development in a manner consistent with environmental concerns. As trilateral discussions on a range of energy-related concerns advance, the CEC should play an active role in assuring that these discussions proceed in tandem with, and take full account of, discussions regarding the need to maintain and enhance environmental protection. In particular, this includes air and water quality, safe use and disposal of hazardous materials, habitat protection, and environmental justice issues, especially regarding border communities, and, in general, ensuring that energy efficiency and renewable energy play a prominent role in a North American energy policy. These concepts are consistent with long-term economic development. Moreover, the United States, which uses significantly more energy per capita than Mexico or Canada, should take a leadership role in this area.

Air pollution knows no national boundaries and as we continue to encourage free trade in North America, we need to keep in mind the goal of sustainable energy. America's leadership role on energy conservation and renewables will establish the need for other countries to cooperate in the effort to promote economic development consistent with a clean environment.